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MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1500

GENERAL ELECTRIC COMPANY

Petitioner,

vs.

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION.

CHARLES S. WIBLE
LOVETT, WIBLE & LAMAR
208 West Third Street
Owensboro, Kentucky 42301

Counsel for Respondent

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QUESTIONS PRESENTED

1. Whether evidence of prior negotiation discussions and past practices was not admissible to interpret the meaning of a contract, where the contract language was clear and unambiguous.

2. Whether the Sixth Circuit Court of Appeals properly held that the Union was entitled to a jury trial on its Amended Complaint.

STATEMENT OF THE CASE

Local 783, Allied Industrial Workers of America, AFL-CIO (the Union), and General Electric Company (the Company) are

parties to a Collective Bargaining Agreement dated March 3, 1970, and to remain in effect until August 19, 1973, covering the Company's facilities in Owensboro, Kentucky.

The breach of contract action brought by the Union against the Company involves Article XVI, Section 5, which provides as follows:

> "There shall be no farming or letting out or transfer of machinery or work for the purpose of curtailing or reducing employment in the plant."

The above-quoted contractual language has been contained in all of the previous agreements between the Union and the Company since 1945.

On March 5, 1970, the Company commenced a transfer of machinery and work from its Owensboro facilities to its new plant in Singapore. These shipments were continued periodically throughout 1970 and 1971.

The Company produces at its Singapore plant tube mounts previously made at the Owensboro facilities covered by the Collective Bargaining Agreement.

Over 300 employees were layed off from the Company's Owensboro facilities, all of whom had performed the same work being done at the Company's Singapore plant.

The Union filed a grievance alleging a violation of Article XVI, Section 5, by virtue of the transfer of machinery and work from Owensboro to Singapore. This grievance was processed through the various steps in the grievance procedure.

After completion of the grievance procedure, the Union sought arbitration, but grievances arising under Article XVI, Section 5 are specifically non-arbitrable except by consent of the Company, and the Company refused the Union's request for arbitration.

The Union filed suit in state court to enjoin the Company from transferring machinery, equipment and work from its Owensboro facilities to Singapore or any other location in violation of

Article XVI, Section 5 of the Collective Bargaining Agreement between the parties. A restraining order as requested by the Union was issued in the state court. The Company then removed the action to the District Court, and the District Court denied the Union's motion for a temporary injunction and dissolved the restraining order issued in state court.

Nine months after removal to Federal Court and eight days before the case was scheduled for trial before the Court, the Union moved to amend its complaint to assert a claim for money damages on behalf of its members for loss of wages and fringe benefits resulting from the Singapore transfer. In its tendered amended complaint, the Union expressly demanded a jury trial.

The District Court granted the Union leave to file its amended complaint, except as to the jury trial demand, but permitted the Union and the Company to file briefs on the question of whether a jury trial should be granted.

After the District Court declined to allow a jury trial, the Union petitioned the Court of Appeals for a writ of mandamus to compel the District Court to vacate its order denying a jury trial. The Court of Appeals declined to issue the writ.

After the Union unsuccessfully attempted to obtain a stay of the non-jury trial for the purpose of petitioning this Court for certiorari to review the denial of mandamus, the case proceeded to trial before the District Court without a jury.

The District Court held that the wording of the clause in question was ambiguous and that evidence of negotiation discussion and past practices could be introduced to explain the meaning of the contractual language. The District Court further found that the prohibition of Article XVI, Section 5 did not apply to a transfer of machinery or work to another General Electric plant and dismissed the complaint for lack of liability.

The Court of Appeals reversed the Judgment of the District Court on the grounds that: (1) " . . . . the circumstances present in this case were not of the exceptional nature required to per-

mit the attachment to the amended complaint the condition that the new issues would not be tried to a jury" 471 F.2d 751, 756; and (2) "Since we find that the farming-out clause is clear on its face and not ambiguous, we therefore hold that evidence of bargaining history is not admissible to explain its meaning." 471 F.2d 751, 758.

ARGUMENT

1.

The Decision below is not in conflict with the decision of another Court of Appeals on the same matter.

The Decision rendered by the Sixth Circuit Court of Appeals is not in conflict with the decision of another court of appeals on the same matter. The Seventh and Ninth Circuit decisions cited by Petitioner do not present any conflicts with this case. *Forest Industries, Inc. v. Local U. No. 3-436, Int. Woodworkers,* 381 F.2d 144 (9th Cir. 1967); *Pacific Northwest Bell Tel. Co. v. Communications Wkrs. of A.*, 310 F.2d 244 (9th Cir. 1962); *Independent Petroleum Workers v. American Oil Co.*, 324 F.2d 903 (7th Cir. 1963), Aff'd Per Curiam by eq div ct. 379 U.S. 130 (1964) rehearing denied 379 U.S. 985 (1965); *General Teamsters, Chauffeurs, & Helpers U. v. Blue Cab Co.*, 353 F.2d 687 (7th Cir. 1965); and *Local U. No. 483 Int. Bro. of Boilermakers, etc. v. Shell Oil Co.*, 369 F.2d 526 (7th Cir. 1966). Petitioner's reliance upon the above-cited Seventh and Ninth Circuit decisions is misplaced. In all of these cases, the Courts found the contract language to be ambiguous, thus marking a clear distinction between those cases and the present case.

In the *Forest Industries* case, *supra*, the Ninth Circuit determined that the contract was ambiguous with respect to the question of what constituted a "grievance". The Ninth Circuit interpreted *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) " . . . . to the effect that

a liberal and broad construction should be given to the term 'grievance' in the interest of encouraging the use of machinery which the parties themselves have set up for the peaceful settlement of disputes." 381 F.2d 144, at 146. It is significant to note that the dispute involved in the present case is not even subject to arbitration, without Petitioner's consent, which Petitioner has refused.

In the *Pacific Northwest Bell Tel. Co.*, case, *supra*, the Ninth Circuit expressly found that the meaning of the contract was not plain in the following language:

> "It simply cannot be said that as to the arbitrability of disciplinary suspensions the contract's meaning is plain when the fact is that the contract is silent." 310 F.2d 244, at 247.

Moreover, the Second Circuit in *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. General Electric Co.*, 332 F.2d 485 (2nd Cir. 1964), cert. den. 379 U.S. 928 (1964), had this to say about the holding in *Pacific Northwest Bell Tel. Co., supra*:

> "Neither of the two Ninth Circuit cases the company relies upon in its brief constitutes authority for the broad use of bargaining history which the company would have us undertake." 332 F.2d 485, at 490.

The same common thread of contractual ambiguity as was present in the Ninth Circuit cases also runs through the decisions of the Seventh Circuit. In *Independent Petroleum Workers v. American Oil Co., supra*, the question presented was whether the parties had obligated themselves by contract to submit a grievance to arbitration. The Court did not consider bargaining history until it first determined that the contract contained no express provision requiring arbitration of the disputed grievance.

The Seventh Circuit held in *Local U. No. 483 Int. Bro. of Boilermakers, etc. v. Shell Oil Co., supra*, that the disputed claim, involving contracting out of work, was not "on its face" covered

by the rather narrow wording of the contract, and affirmed the lower court's decision that a party cannot be compelled to arbitrate a grievance when the parties have not agreed to arbitration of such a grievance.

The Court's holding in *General Teamsters, Chauffeurs, & Helpers U. v. Blue Cab Co., supra,* was that the disputes in that case were subject to the application of the broad arbitration clause there involved, and the Court affirmed the lower court's order to arbitrate. The reference to past practices and prior bargaining history was mere dictum in the case.

Petitioner would minimize the effect of the earlier Seventh Circuit decision in *Anson v. Hiram Walker & Sons, Inc.*, 222 F.2d 100 (7th Cir. 1955) cert. den. 350 U.S. 840 (1955) rehearing den. 248 F.2d 380 (7th Cir. 1957), but *Anson* has not been overruled, and it is still the law in the Seventh Circuit.

Petitioner has completely misinterpreted the Second Circuit case, *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. General Electric Co., supra.* Petitioner states on page 12 of the Petition that the Second Circuit " . . . . simply held that a court will not consider bargaining history where it touches upon both the questions of arbitrability and the merits of a dispute." This statement completely ignores the view of the Second Circuit as stated in footnote 5 of the Opinion. 332 F.2d 485, at 490:

> "Since bargaining history would appear to be a proper device for interpreting a contractual provision *only when that provision is ambiguous or otherwise unclear* and since an exclusionary clause to be effective must be clear and unambiguous, one might properly question the use of any bargaining history to indicate that a clause in a bargaining contract has been designed to exclude a certain type of grievance from arbitration." (emphasis added)

This case does not present a conflict with the decision of another court of appeals on the same matter, and the decision

in this case is firmly grounded upon decisions of the Second, Fifth, and Seventh Circuits cited in the Sixth Circuit's Decision. Moreover, it is well supported by an earlier Sixth Circuit decision. *Tennessee Consolidated Coal Co. v. United Mine Workers of America*, 416 F.2d 1192 (6th Cir. 1969), cert. den., 397 U.S. 964 (1970).

2.

The Decision in this case is not in conflict with applicable decisions of this Court.

The Sixth Circuit did not decide a federal question in a way in conflict with applicable decisions of this Court. Petitioner only cites two decisions of this Court in support of its contention that this Court should grant certiorari, based upon conflict with applicable Supreme Court decisions. *T.-C.E. Union v. Union Pacific R. Co.*, 385 U.S. 157 (1966), rehearing denied 385 U.S. 1032 and *Drake Bakeries v. Local 50*, 370 U.S. 254 (1962). These decisions are clearly not applicable to the present case.

T.-C.E. Union v. Union Pacific R. Co., supra, involved a jurisdictional-type dispute over the assignment of work by the Union Pacific to the Railway Clerks, rather than to the Telegraphers. Certiorari was granted "in order to settle doubts about whether the Adjustment Board must exercise its exclusive jurisdiction to settle disputes like this in a single proceeding with all disputant unions present." 17 L.Ed. 2d 264, at 268. The rationale of the Court's decision was that, since the dispute involved the claims of two competing unions, the Railroad Adjustment Board should have given both unions the opportunity to appear and present their respective cases and that the Board should have gone beyond the single collective bargaining agreement of the complaining union and considered the agreements of all unions involved in the overall dispute.

Drake Bakeries v. Local 50, supra, is equally inapposite. In *Drake Bakeries,* the Court affirmed the lower court's decision that an employer's damage suit for breach of a no-strike clause in a collective bargaining agreement should be stayed pending completion of arbitration. The Court's decision was based upon the broad language of the grievance and arbitration provisions of the contract and the reasoning that if the parties had intended to exclude strikes in breach of contract from the arbitration provision, they would have used express language to do so.

3.

The Sixth Circuit correctly decided what evidence cannot be considered in interpreting the collective bargaining agreement involved in this case.

Respondent would agree that promotion of industrial peace is certainly a prime consideration in formulating substantative law under § 301. That is why this Court encouraged the use of arbitration as a means of promoting industrial peace in *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). However, Petitioner's pious sounding proclamations in support of industrial peace lose most of their meaning when stacked up with Petitioner's adamant refusal to submit this non-arbitrable dispute to voluntary arbitration.

Respondent does not seek to "dot every i and cross every t" but rather seeks to obtain damages on behalf of its members resulting from the Company's violation of the clear and unambiguous contractual language of the collective bargaining agreement.

From a policy standpoint, if the parties to collective bargaining agreements are permitted to use extrinsic evidence to show the meaning of contract language which is clear and unambiguous on its face, there would be no end to disputes and differences between the parties. Surely, this would not serve to

promote industrial peace, particularly when the employer can refuse to submit the dispute to arbitration, as did the employer in the present case.

4.

The proper approach to the interpretation of collective bargaining agreements depends upon the particular contract language in question.

The Sixth Circuit determined in this case that the clause of the contract in question is clear and unambiguous in its meaning, and followed precedents of the Sixth Circuit and other Circuits that:

> "Only when the Court has determined that the contract is ambiguous is a construction of the clause necessary. After a finding of ambiguity has been made, 'evidence of the surrounding circumstances and the practical construction of the parties is admissible to aid in its interpretation.' " 471 F.2d 751, at 757.

The distinction between the scope of judicial inquiry with regard to particular contract clauses was emphasized in the concurring opinion in the *Steelworkers Triolgy. United Steelworkers of America v. American Manufacturing Company; United Steelworkers of America v. Warrior and Gulf Navigation Company; United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 569. It was pointed out by Associate Justices Brennan and Harlan that the arbitration clauses in *American* and *Warrior* were quite different. In *American* the arbitration clause was the "standard" form that provides for the arbitration of "any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of this agreement. . . ". On the other hand, in *Warrior*, the arbitration clause excluded from arbitration

"matters which are strictly a function of management." As stated by Mr. Justice Brennan:

> "Because the arbitration promise is different, the scope of the court's inquiry may be broader." 363 U.S. 569, 570.

Petitioners reliance upon *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F. 2d 1123 (3rd Cir. 1969) is misplaced. There the Third Circuit was faced with the question of whether an arbitrator had exceeded his authority in the interpretation of the collective bargaining agreement. The Court held that the award was not contrary to any rational interpretation of the collective bargaining agreement and that the lower court's interference with the award was not proper.

Langer v. Iowa Beef Packers, Inc., 420 F.2d 365 (8th Cir. 1970) relied upon by Petitioner, supports Respondent's position. In *Langer*, the Court enunciated the following rule of contract interpretation:

> "Contract interpretation is generally a matter of law, while the intent of the parties is generally a question of fact. But where no extrinsic evidence is necessary to determine the intent of the parties, and where the intent is implied from the agreement and from its context, the legal effect of the agreement is properly resolved by the courts as a matter of law". 420 F.2d 365, 367-368.

5.

The Sixth Circuit decision correctly disposed of the jury trial issue and is not in conflict with applicable decisions of this Court.

Petitioner contends that the Sixth Circuit decided the question of the Union's entitlement to a jury trial on the merits in the mandamus proceeding, and, thus, the Court was precluded from considering the jury trial question on appeal.

The obvious fallacy of Petitioner's argument is that it begs the questions of exactly what the merits of the jury trial question were and when the Sixth Circuit dealt with the actual merits of the question.

In dealing with the jury trial issue on appeal, the Sixth Circuit acknowledged the holding of *Parissi v. Foley*, 203 F.2d 454 (2d Cir. 1953), rev'd on other grounds, 349 U.S. 46 (1955), that " . . . a judge can, within his discretion, permit a party to amend his complaint only on the condition that a timely demand for a jury trial be stricken from the amended complaint." 471 F.2d 751, at 755; however, the Court went on to state that the question before the Court and the answer to that question were:

> "The question, then, is whether the circumstances in this case warranted such a condition. We think they did not."

Thus, the merits of this question involved whether the circumstances in this particular case warranted the District Court's exercise of discretion in permitting the union to amend its complaint only on the condition that a timely demand for a jury trial be stricken from the amended complaint.

The second question, then, is when the Sixth Circuit considered the merits of the case for the first time. Certainly, it is clear that the Sixth Circuit did not in the mandamus proceeding undertake a thorough analysis of the facts relative to whether the District Court's exercise of discretion was warranted. Obviously, the Sixth Circuit took the position in the mandamus proceeding as is stated in its decision on appeal that " . . . . mandamus will not be used to review an interlocutory order except in extreme and exceptional cases. *Black v. Boyd*, 248 F.2d 156 (6th Cir. 1967), modified, 6th Cir., 249 F.2d 441." Plainly, the Court of Appeals felt that the mandamus proceeding between these parties was not such an extreme and exceptional case as would require the Court to use the drastic remedy of mandamus, and that the merits of the case could be fully con-

sidered by the Court upon appeal of the whole case. It was not until its decision on the entire case that the Sixth Circuit for the first time considered and decided the merits of whether the circumstances warranted the exercise of judicial discretion in permitting the amendment of the complaint upon condition that a timely demand for jury trial be stricken from the amended complaint.

After a complete and comprehensive review of the facts, the Sixth Circuit concluded that:

> "Accordingly, we find that the circumstances present in this case were not of the exceptional nature required to permit the attachment to the amended complaint the condition that the new issue would not be tried to a jury." 471 F.2d 751, at 756.

The Sixth Circuit's action on the jury trial issue is in accord with *In re Previn*, 204 F.2d 471 (1st Cir. 1953) where it was held that the matter of whether a trial court abused its discretion in not allowing a jury trial demand should properly be settled when and if the case came on appeal from a final judgment.

Angel v. Bullington, 330 U.S. 183 and *Brownell v. Chase Nat. Bank*, 352 U.S. 36, 39 (1956), cited on page 24 of the Petition herein are not applicable. In those cases, this Court held that once a dispute has been litigated, a later action cannot be maintained in a different forum.

CONCLUSION

The Sixth Circuit correctly determined that the clause of the collective bargaining agreement is clear and unambiguous and that, therefore, evidence of negotiation sessions and past practices was inadmissible to interpret the meaning of the clause. This determination is not in conflict with the decisions of another court of appeals on the same matter, nor is the Sixth Circuit decision in conflict with applicable decisions of this Court.

The Court of Appeals correctly decided the jury trial issue. There is no conflict between the Sixth Circuit decision on this matter and applicable decisions of this Court.

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES S. WIBLE
LOVETT, WIBLE & LAMAR
208 West Third Street
Owensboro, Kentucky 42301

Counsel for Respondent.